



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION No. 06 -52

SUBJECT: DEAN HELLER
FORMER SECRETARY OF STATE
STATE OF NEVADA

A. JURISDICTION:

In his former capacity as Nevada Secretary of State, Dean Heller was a public officer as defined by NRS 281.4365. As such, the Nevada Commission on Ethics has jurisdiction over this complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Request for Opinion (complaint) 06-52, submitted by Mark Devine, received August 2006, including the following attachments (TAB B):
 - Computer screen captures of television campaign advertisements purportedly filmed within the office of the Nevada Secretary of State;
 - Campaign flier with picture of Mr. Heller purportedly seated at the desk of the Secretary of State;
 - Reports of Receipts and Disbursements made by the Heller for Congress Organization
- Reviewed *Waiver of Statutory Time Requirement* received August 2006 and response submitted October 2006 (TAB C)
- Reviewed campaign materials submitted by Mr. Heller (TAB D):
 - Invoice and payment documentation for production of video footage used for campaign commercials and fliers;
 - DVD with television campaign advertisements;
 - Printed campaign advertising mailers;
 - Rent schedule for the Secretary of State fiscal year 2006;
 - March 2006 personal cell telephone bill for Stacy Woodbury, Nevada Commission of Ethics Executive Director at the time of the alleged violation;
 - Affidavit of Stacy Woodbury
 - Samples of other political candidates campaign materials

C. RECOMMENDATION:

Based on the results of investigation, it is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481 (7)

SPECIFIC REASON:

Sufficient credible evidence does not exist to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether Mr. Heller violated the provisions of NRS 281.481(7).

D. SUMMARY OF REQUEST FOR OPINION (COMPLAINT):

The complaint, submitted by Mark Devine, alleges violations of NRS 281.481(7) by then Nevada Secretary of State Dean Heller. The following is the substance of the complaint:

Television advertisements advocating for Secretary of State Dean Heller, who is running for U.S. Congress, were filmed in Mr. Heller's official Secretary of State office. The ads, titled "Job" and "Predators", show Mr. Heller in his office.

Mr. Heller also sent out a campaign flier with a picture of him in his Secretary of State office.

Dean Heller's use of his state office in his political campaign advertisements gives the appearance of impropriety. Mr. Heller is misusing his office to give himself an advantage over his opponents.

The law states that, if a public officer or employee uses his or her position to an advantage, the officer would have to pay the same cost that a regular member of the public would have to pay. According to his latest financial records filed, Mr. Heller has not reimbursed the state of Nevada any costs for filming in his office.

E. SUMMARY OF SUBJECT'S RESPONSE:

Mr. Heller submitted a limited *Waiver of Statutory Time Requirement* in August 2006, expressly waiving the provisions of NRS 281.511(3) related to the investigation time requirement but declined to waive the provisions of NRS 281.511(4) until such time as the panel makes its finding regarding just and sufficient cause. In October 2006, Mr. Heller submitted the following response:

Mr. Heller held the office of Secretary of State from 1994 through 2006.

Mr. Devine is correct as to certain facts set forth within his complaint; however, he brings such facts forward to a conclusion which is both faulty and contradictory to previous opinions of the Commission on Ethics - and which leads to illogical, irrational, and absurd conclusions under state ethics law.

Between March 30 and April 1, 2006, the Heller for Congress campaign hired Golden Hour Pictures production company to film video footage to use in campaign commercials, advertisements, and mailers for the campaign. Filming was done in several locations in and around Carson City, including in Mr. Heller's personal office in the state Capitol building. The Heller for Congress organization paid for the production company's services.

The photo shoot at Mr. Heller's office in the state Capitol building was conducted after 5:00 p.m. on Friday, March 31, 2006. The state Capitol building closes to the public at 5:00 p.m., with the only remaining individuals inside the Capitol building being either state employees who have to work late or Capitol Police officers who are stationed on the premises 24 hours a day, 7 days per week.

Other than Mr. Heller, no state employees were party to or participated in the filming within his office on March 31. Although a few employees of the Secretary of State may have been in the office after 5:00 p.m. that Friday, no employees were required or requested to stay at the Capitol building beyond the regular conclusion of their workday on March 31.

Subsequent to the March 31 filming, video footage was utilized in preparing campaign commercials, advertisements, and mailers, including footage taken in Mr. Heller's personal office in the state Capitol building. The television commercials, entitled "Job" and "Predators", were first publicly televised on June 12, 2006, and were available for viewing on the Heller for Congress web site during the campaign.

Mr. Heller believes he was not prohibited from using his office in that the limited criteria for personal use under NRS 281.481 (7)(a) were met. He is the public officer who is responsible for, and has authority to authorize the use of, governmental time, property, equipment, or other facility relating to the office of the Secretary of State. Whenever the Capitol building is open, the public always has full access to the office of the Secretary of State. Visitors to the Capitol building are welcome to come into Mr. Heller's office and look around, sit in his chair, take photos, etc. These are frequent occurrences. Further, his office is regularly open to the public for use during specific periods. For instance, during filing periods for declarations of candidacy, his office is open for use by members of the public to fill out their declaration of candidacy forms. On the primary and general election days, the office is open to members of the public or the press to visit and experience the excitement of being in the Secretary of State's office when election results are rolling in. Courtesy computer workstations are even set up for public use to check election results. Members of the public have never

been charged for visiting or using the office or equipment located within his office.

The filming occurred in Mr. Heller's office after 5:00 p.m. on Friday, March 31, 2006. On this evening, he had no official duties to tend to as Secretary of State and considered himself to be on his own personal time. The use did not interfere with the performance of his public duties.

The cost or value of the office use was nominal. Mr. Heller's personal office represents only a small portion of the 11,700 square feet of space occupied within the Capitol building by nearly fifty staff members of the Secretary of State's office. Any cost resulting from an extra couple of hours of electricity used within this small portion of the Capitol building would be difficult to calculate and a negligible or nominal amount at best.

On the evening of March 31, 2006, former State Controller Kathy Augustine saw the production crew in Mr. Heller's office and informed the Capitol Police that Mr. Heller should not be filming in his office because the State Commission on Ethics fined the controller \$15,000 for using her office for campaign purposes. The Capitol Police relayed this information to Mr. Heller's executive assistant, an unclassified state employee who happened to still be at the office (but who left shortly thereafter this incident). The executive assistant promptly relayed this information to Mr. Heller. At 5:34 p.m. on March 31, Mr. Heller placed a telephone call to then Executive Director of the Commission on Ethics Stacy Woodbury. Mr. Heller discussed the situation with Ms. Woodbury, the provisions of ethics law, and the differences between his situation and the Augustine case. Mr. Heller acknowledges that Ms. Woodbury could not provide him with legal advice but felt comfortable proceeding with the taping after their conversation.

The use of the office for the photo shoot did not create the appearance of impropriety. The "appearance of impropriety" is a term that is not defined within the Ethics in Government Law or anywhere within the Nevada Revised Statutes. Further, the Commission should not fall victim to post hoc, ergo propter hoc. Merely because an ethics complaint was filed after the campaign advertisements aired does not mean and it cannot be assumed the filming of the advertisement actually created the appearance of impropriety. The use was warranted - with justification and adequate reason. Although statute does not define this term for the purposes of NRS 281.481(7), the issue of a justifiable reason must be considered in making an appropriate interpretation regarding the provisions of NRS 281.481(7)(a)(4). Mr. Heller has served as Secretary of State for the past twelve years. He has held no other office of profit. As a current office holder running for another political office, he has an inherent right to not only outline his credentials to voters – but to illustrate to voters that he has served as their Secretary of State. To do that by taping video footage of himself in his place of employment is appropriate, warranted, and justified.

The Commission on Ethics has opined regarding the appearance of impropriety in only a few instances in recent years. In Opinion No. 98-41, the commission opined that an advertisement with a political endorsement that showed the physical accouterments of the office of a public officer (with such accouterments specified as his office, title, employees, time, equipment, and other physical items) would result in an advantage to another person, namely the candidate so endorsed. Ultimately, the commission found no violation of NRS 281.481(2) because the local county code did not prohibit such activities and as such the public officer's use of the accouterments was not unwarranted. In the same opinion, the commission further opined that the public officer's conduct will not create an appearance of impropriety under NRS 281.481(7)(a)(4) by endorsing a person's candidacy if he or she uses his or her name and official title in an advertisement, but will create an appearance of impropriety under NRS 281.481(7)(a)(4) if, in the course of endorsing a person's candidacy, he uses the physical accouterments of his office or position to bolster the endorsement: "For example, a public officer should not use his uniform, badge, employees, private office, or other non-public facilities for the purposes of making an endorsement advertisement. At all times, public officers should temper their constitutional right to speak out on political concerns with a common-sensical realization that the reason their endorsement is sought is because of their public position and the respect and deference that that position is accorded by the public" (NCOE Opinion No. 98-41).

The accouterments of holding the office of Secretary of State are not as clearly recognizable as that of the law enforcement officer referenced in Opinion No. 98-41. There is neither uniform nor patrol car associated with the office of Secretary of State. The only accouterment pertinent in the instant matter is the physical personal office space of the Secretary of State. As Mr. Devine points out in his complaint, the backdrop of the ad could just as easily have been a production set. It was not readily apparent, even to the complainant, that the advertisement was filmed in the actual office of the Secretary of State. Given this information by the complainant, it cannot be concluded the use of the office created an appearance of impropriety as alleged in the complaint.

In Opinion No. 96-60, the commission opined that the use of Nevada State Senate stationery for a recommendation letter written by a state senator created the appearance of impropriety because the state senator could have used her university stationery to make a partisan recommendation for one student Democratic club rather than another. However, the Commission concluded that the state senator did not violate NRS 281.481(8) [equivalent to NRS 281.481(7) for legislators] because she was not legally prohibited from using her senate stationery.

In Opinion No. 01-10, the commission advised the public officer against the use of governmental time, property, equipment, or other facility, and further not to

require any legislative employees to perform activities, related to a fundraising letter for the Republican Party.

In the first opinion referenced above, the Commission addressed the endorsement of a candidate. In the second opinion, the Commission addressed the endorsement of a university student club. In the third opinion, the Commission addressed a political fundraising letter. The instant matter is distinguishable from previous cases because the office was used to educate voters regarding Mr. Heller's experience as a public officer and his credentials as a candidate for public office, and not that of endorsing another candidate or entity or for the purposes of political fundraising.

In Opinion No. 04-47, the commission found that a public officer willfully violated NRS 281.481(7) three times by causing a subordinate to perform campaign-related functions on state time and causing equipment and facilities owned by the State of Nevada and located in the office of the public officer to promote her re-election campaign. The evidence before the Commission in that case was considerable. Employees of that office were unduly influenced into using state computers and state time to make campaign fliers, write campaign speeches, and compile campaign contribution and expenditure reports. Employees assembled campaign fundraiser mailings in that office on state time. The public officer even held a campaign fundraiser selling pearl jewelry to her employees in her personal state office.

In Opinion No. 04-81, the commission found a school teacher's use of the school district's electronic mail system to communicate with other employees of the school district to advise them of a neighborhood walk in support of a candidate was not a violation of NRS 281.481(7), as the school district does not charge employees or other persons for the use of its electronic mail system and the system is accessible to parents and other members of the public who use the system to communicate with teachers. However, the commission did find that the teacher had violated NRS 281.481(7) because he sent the message between 7:00 a.m. and 7:08 a.m. which was during the teacher's daily classroom preparatory period – a time when he was being paid a salary by the taxpayers.

The instant matter is more analogous to the last opinion referenced above. In the instant matter, no state time or state employees were utilized. The Capitol Building was closed to the public. The cost was nominal. The use did not interfere with the official performance of Mr. Heller's duties as Secretary of State. The use was in accordance with a long-established open door policy within his office.

In Opinion No. 02-08, the Commission opined that a county sheriff's use of his official sheriff's department vehicle to drop off pest control reports for a pest control service, owned by the sheriff, to title companies during normal business hours did not violate NRS 281.481(7). The sheriff had an established policy that

authorized limited personal use of vehicles, the use did not interfere with his public duties, and the cost was negligible. The Commission further opined the de minimis personal use did not create the appearance of impropriety, and stated the “appearance of impropriety” for a public officer “can be defined as conduct that would cause a reasonable person to perceive that the public officer’s ability to carry out his or her official responsibilities with integrity, impartiality and competence (attributes incorporated in the Legislature’s public policy declaration in NRS 281.421 regarding public office) is impaired” (NCOE Opinion No. 98-41).

There is no credible evidence provided within the complaint that the limited use of Mr. Heller’s office would cause a reasonable person to believe or perceive that his ability to carry out his official responsibilities as Secretary of State with integrity, impartiality, and competence is in any way impaired. Moreover, the complaint contains no evidence in support of such an allegation at all.

Another issue raised in Opinion 02-08 was that the sheriff was required to be available or on-call 24 hours a day, seven days a week. Though the commission raised this point in relation to the personal use of the official law enforcement vehicle, like reasoning can be implemented when it relates to a constitutional officer such as the Secretary of State or the Governor. The nature of serving as the Governor, who signs all official acts of the State, or the Secretary of State, who must always attest to the Governor’s official signature, requires that the incumbents be available and on-call 24 hours a day, 7 days a week. The nature of the statutory duties conferred upon the office of Secretary of State render it virtually impossible for the incumbent to separate himself from the office that he has held for the past 12 years. Therefore, he has an inalienable right to show himself at his place of employment.

Mr. Heller finds the timing of this ethics complaint particularly interesting. The television ads were first aired publicly on June 12, 2006, and have been available for viewing on his campaign web site since that time. The requester filed his complaint four days prior to the August 15 primary. The requester also provided a copy of the complaint to members of the press despite the statutory confidentiality cloaking ethics complaints through the investigative period and until a panel proceeding is held regarding just and sufficient cause. Mr. Heller questions the requester’s political motivation and suggests that the outcome of his race had the potential to be influenced if the media had reported the charges within the ethics complaint.

To opine that Mr. Heller cannot be filmed in the office of the Secretary of State if the film will be used within the context of a political campaign extrapolates the provisions of ethics law to an absurd legal conclusion, and sets a dangerous legal precedent. The commission will set forth an edict that legislators may not use footage of themselves on the floor of the Senate or Assembly, city councilmen cannot use footage of themselves sitting on the council dais, and so on.

Campaign literature, commercials, or web sites for incumbents, often include photos of the incumbents acting in their official capacity – seated in their legislative or other government office, speaking on the floor of the Legislature or in the Council or Commission chambers, or even their courtroom. To strip away the rights of public officers to show themselves acting in their official capacity is to effectively limit the ability of incumbents to campaign for public office, and may even violate the free speech provisions of the First Amendment to the Constitution of the United States.

No credible evidence has been provided within the complaint that a violation of NRS 281.481(7) occurred. The misguided and disingenuous assumptions set forth in the duplicitous complaint lack merit and do not constitute credible evidence that any violation of law occurred. Therefore, the Commission panel must dismiss the complaint.

F. RELEVANT STATUTE:

NRS 281.481 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

* * * * *

7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

➤ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

* * * * *

G. RESULTS OF INVESTIGATION:

Mr. Heller, Secretary of State at the time of the alleged violation, does not dispute the fact that he used his personal office space to create video footage and still photo images of himself to be used in the production of advertising materials for his congressional campaign race. However, Mr. Heller disputes that his conduct violated NRS 281.481(7).

NRS 281.481(7)(a) allows for “a limited use of governmental property, equipment or other facility for personal purposes if” the public officer meets the four criteria under NRS 281.481, subparagraph 7(a). Mr. Heller is the public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility. He stated that his established policy allowed for the public to come into his office anytime the Capitol building was open to the public. The personal use did not interfere with the performance of his public duties due to the fact that the photo shoot took place after normal business hours. Based upon the evidence, the cost or value related to the use was nominal. Essentially the same costs of operating the office would have continued whether or not this personal use occurred. No costs other than those ongoing costs associated with rent and utilities were incurred. These costs would have been incurred regardless of whether the personal use had occurred. When Mr. Heller was informed that the use might not be appropriate, he inquired with the then Executive Director of the Commission on Ethics, Stacy Woodbury, regarding his intended use. Whether or not Mr. Heller’s conduct created the appearance of impropriety is the most difficult of the four criteria to measure. Mr. Heller presents a persuasive argument that it is common for a candidate seeking election to public office to communicate and identify who they are through images of the candidate conducting business activities within the context of their job or profession. Mr. Heller argues that his job as Secretary of State was his identity and he had a right to communicate his image as Secretary of State to the electorate during his congressional race.

Based upon the evidence and analysis of the findings of the previous Commission on Ethics opinions cited by Mr. Heller, it appears that there is no credible evidence that Mr. Heller used governmental time, property, equipment or other facility to benefit his personal or financial interest beyond the limited use allowed under subparagraph 7(a) of NRS 281.481.

H. CONCLUSION:

The Executive Director finds that there is no credible evidence to substantiate a potential violation of NRS 281.481(7). Accordingly, the Executive Director recommends that the panel find just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion regarding whether Mr. Heller violated the provisions of NRS 281.481(7).

Prepared by: Matt C. DiOrio
MATT C. DI ORIO
SENIOR INVESTIGATOR

DATED: March 1, 2007

Approved by: L. Patrick Hearn
L. PATRICK HEARN
EXECUTIVE DIRECTOR

DATED: March 1, 2007